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In The
Supreme Court of the United States

October Term, 1996

MELVIN JEFFERSON, individually and as the Administrator
of the Estate of Alberta K. Jefferson; LEON JEFFERSON; and
BENJAMIN JEFFERSON,

Petitioners,

vs.

CITY OF TARRANT, ALABAMA,

Respondent.

*On Petition for a Writ of Certiorari to the
Alabama Supreme Court*

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Supreme Court of the United States have jurisdiction of Petitioner's Petition for Writ of Certiorari asserting federal issues and constitutional grounds raised for the first time in the Petition which the Alabama Supreme Court had no opportunity to consider?

2. When a decedent dies as the result of an alleged deprivation of federal rights occurring in Alabama, is the survivability of that decedent's cause of action brought under 42 U.S.C. § 1983 governed by federal common law or by reference to the Alabama Wrongful Death Act?

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OPINION BELOW

The opinion of the Alabama Supreme Court is reported at *City of Tarrant v. Jefferson*, 682 So. 2d 29 (Ala. 1996).

OBJECTION TO JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). The Petition presents for the first time constitutional arguments that were never presented to the Alabama Supreme Court.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

The United States constitutional provisions involved are the Supremacy Clause, U.S. CONST. art. VI, and both the equal protection and due process clauses of the Fourteenth Amendment. U.S. CONST. amend. XIV § 1.

The Alabama constitutional provision involved is the Judicial Article. ALA. CONST., art. VI, amend. 328, § 6.02 (1901).

The statutory provisions involved are 42 U.S.C. §§ 1983 and 1988, ALA. CODE § 6-5-410 (1975), and ALA. CODE § 6-6-227 (1975).

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.1, the City of Tarrant makes the following Statement of the Case, in part, to correct perceived misstatements contained in the Petition for Writ of Certiorari.

The Petitioners seek a review of the judgment of the

Alabama Supreme Court reversing a trial court's denial of the City of Tarrant's motion for judgment on the pleadings. Importantly, the holdings of the state trial and appellate courts were made strictly as a matter of law.

In their complaint, the Petitioners sought damages in four separate counts: Count One alleges a cause of action under the Alabama Wrongful Death Act premised on intentional, negligent, wanton, careless or unskilled actions or inactions; Count Two sought damages under the Alabama common-law tort of outrage; Count Three sought damages under § 1983 for the deprivation of life pursuant to the Fourteenth Amendment to the Constitution; Count Four sought damages under § 1983 for denial of equal protection and discrimination.

The City of Tarrant moved the trial court for a judgment on the pleadings, pursuant to Rule 12(c) ALA. R. Civ. P., as to Counts Three and Four, which sought relief under § 1983. This motion was denied. Even though the trial court made its ruling as a matter of law, in their Petition, the Petitioners have attempted to provoke this Court with emotional entreaties, suggesting, for example, that the trial court had evidence before it that the City of Tarrant Fire Department did not treat black and white sections of town equally. In fact, no *admissible* evidence was presented to the trial court in support of this allegation. In any event, the evidence presumably did not color the trial court's judgment favoring the Petitioners as its decision, as well as the subsequent reversal by the Alabama Supreme Court, were made strictly as a matter of law. *See City of Tarrant v. Jefferson, supra*.

Pursuant to Rule 5, ALA. R. APP. P., the Alabama Supreme Court allowed the City of Tarrant to appeal by permission from an interlocutory order denying the City of Tarrant's motion for judgment on the pleadings. *Jefferson*, 682 So. 2d at 29. The Alabama Supreme Court reversed the trial court and remanded

the case. *Jefferson*, 682 So. 2d at 31. On August 30, 1996, the Alabama Supreme Court denied the Petitioners' application for rehearing. *Jefferson*, 682 So. 2d at 31. Subsequently, the trial court granted partial summary judgment in favor of the City of Tarrant as to Count Two. Only Count One remains; it seeks damages under state law for the death of Petitioner Melvin Jefferson's decedent.

REASONS FOR DENYING THE WRIT

I.

THE SUPREME COURT DOES NOT HAVE JURISDICTION TO CONSIDER THE PETITIONERS' CONSTITUTIONAL ARGUMENTS ASSERTED FOR THE FIRST TIME IN THE PETITION AND NOT RAISED BEFORE THE ALABAMA COURTS.

The Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257. They have failed to comply with the requirements of the "properly-raised-federal-question" doctrine. *See Webb v. Webb*, 451 U.S. 493, 500 (1981). "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb*, 451 U.S. at 496-97.

Like the Petitioner in *Webb*, the Petitioners in the instant case failed to assert any violations of the United States Constitution when this action was briefed in the Alabama Supreme Court. None of Petitioners' arguments in the proceedings below addresses constitutional issues. Previously, the Petitioners made only unspecific arguments concerning the Alabama Supreme Court's interpretation of 42 U.S.C. §§ 1983

and 1988 "in a manner that is inconsistent with the Constitution and laws of the United States." In their Petition for Writ of Certiorari, the Petitioners for the first time cited a specific constitutional provision, the Supremacy Clause of the United States Constitution.

Alabama law is consistent with federal law: arguments not presented in the trial court cannot be presented to an appellate court. *Ex parte St. Vincent's Hosp.*, 652 So. 2d 225, 228 (Ala. 1994). At no point in the proceedings in the Alabama courts did the Petitioners provide the Alabama Attorney General with notice that the constitutionality of the Alabama Wrongful Death Act was being challenged. Such notice is required under Alabama law. ALA. CODE § 6-6-227 (1975); ALA. R. APP. P. 44(c); *Wallace v. State*, 570 So. 2d 466, 468 (Ala. 1987). In Alabama, the failure to serve the Attorney General with court documents in which the constitutionality of a state statute is being challenged leaves the reviewing court without jurisdiction to hear the case. *Wallace*, 570 So. 2d at 468.

"At the minimum, . . . there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by law." *Webb*, 451 U.S. at 501. When a Petition fails to do so, this Court has determined that it is without jurisdiction. *Webb*, 451 U.S. at 501-02. The Petitioners asserted claims pursuant to §§ 1983 and 1988 in the court below, but failed to address the Supremacy Clause. Further, the Petition does not state that the Petition was served on the Alabama Attorney General and that 28 U.S.C. § 2403(b) may apply as required by Supreme Court Rule 29.4(c). Accordingly, the Petitioners' constitutional claims should not be considered, and this Petition should be denied for lack of jurisdiction.

II.

APPLICATION OF THE ALABAMA WRONGFUL DEATH ACT IN § 1983 LITIGATION IS CONSISTENT WITH THE CONSTITUTION AND FEDERAL LAW.

The Petition for Writ of Certiorari misstates the law by urging that an application of the Alabama Wrongful Death Act in the context of § 1983 litigation is inconsistent with the Constitution and federal law.

A. When a decedent dies as the result of an alleged deprivation of federal rights occurring in Alabama, the survivability of that decedent's cause of action brought under 42 U.S.C. § 1983 is governed by reference to the Alabama Wrongful Death Act.

Section 1983 contains no survivorship provision. *See* 42 U.S.C. § 1983. However, when federal law is "deficient," 42 U.S.C. § 1988 refers courts and litigants to the law of the state in which the action is brought "so far as the [state law] is not inconsistent with the Constitution and laws of the United States" The Alabama Wrongful Death Act, ALA. CODE § 6-5-410 (1975), is the state statute governing the survival of § 1983 claims arising in Alabama. *See Carter v. City of Birmingham*, 444 So. 2d 373, 374 (Ala. 1983), *cert. denied*, 467 U.S. 1211 (1984) (holding that the survivability of § 1983 claims for compensatory damages is determined by reference to the Alabama Wrongful Death Act).

Federal courts and the Alabama Supreme Court have construed 42 U.S.C. §§ 1983 and 1988 together with the Alabama Wrongful Death Act. With one exception, the courts that have examined the interaction of these statutes have determined that the Alabama Wrongful Death Act governs the

survivability of an action for a decedent's injuries under § 1983. Compare *Brown v. Morgan County*, 518 F. Supp. 661 (N.D. Ala. 1981); *James v. Murphy*, 392 F. Supp. 641, 645 (M.D. Ala. 1975); *Pollard v. United States*, 384 F. Supp. 304, 306 (M.D. Ala. 1974); *Carter*, 444 So. 2d at 373 with *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986).¹ Indeed, the fact that the court in *Weeks* is the *only* federal court to reach the conclusion urged by the Petitioners belies their statement that "[i]t is clear that the federal courts passing on the issue have seen the inconsistency in the application of the Alabama Wrongful Death Act to § 1983 actions" (Petition at 12).

The plain wording of 42 U.S.C. §§ 1983 and 1988 compels the conclusion reached by the Alabama Supreme Court in this case: the survivability of § 1983 claims is determined by reference to the Alabama Wrongful Death Act. *Jefferson*, 682 So. 2d at 30.

As the Petitioners' lawsuit purports to seek recovery for death, it is, even quite apart from the § 1983 claims, purely a creature of statute. Alabama citizens have been able to bring wrongful death actions since 1852. See ALA. CODE § 1938 (1852). The right to bring such actions is statutorily conferred. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 945 (5th ed. 1984) (observing that at common law, the dependents and heirs of a tort victim who had been killed were denied recovery). Alabama is a common-law jurisdiction. See ALA. CODE § 1-3-1 (1975).

1. Suggestions by the Petitioners that the Eleventh Circuit has delivered "binding federal court precedent" holding that the application of the Alabama Wrongful Death Act in § 1983 litigation are disingenuous. (See Petition at 12 n.1). *Gilmer v. City of Atlanta, Georgia*, 864 F.2d 734 (11th Cir. 1989), which is cited for this very proposition in the Petition, addressed Georgia statutes. The statements contained in that opinion concerning Alabama law are mere dicta.

The result in *Carter* presents the only construction that the applicable statutory authority will permit. " 'Since there is no express federal remedy for wrongful death under the civil rights statutes . . . the common and statutory law of the State of Alabama must be looked to for a suitable remedy not inconsistent with the Constitution and the laws of the United States. 42 U.S.C. § 1988.' " *Carter*, 444 So. 2d at 375 (quoting *Pollard*, 384 F. Supp. at 306). The survivability of § 1983 claims for compensatory damages is determined by reference to the Alabama Wrongful Death Act. *Carter*, 444 So. 2d at 374.

Despite the clear statutory directive of 42 U.S.C. § 1988 that state law is referenced when, as here, § 1983 is deficient, the Petitioners suggest that Alabama statutory and common law be abandoned. Apparently, the Petitioners would have this Court fashion a remedy for a federal right of wrongful death recovery based on a federal statute that itself has no provisions concerning the survival of actions, the class of beneficiaries, the proper parties to bring suit, and the damages recoverable. The absence of all of these provisions is the very reason § 1988 references state law in the first place. See *Brown*, 518 F. Supp. at 665 ("In death cases, . . . federal law is deficient. Reference must be made to state law.").

B. Application of the Alabama Wrongful Death Act in the context of § 1983 litigation does not create an inconsistency with the Constitution or with federal law.

Alabama's Wrongful Death Act permits the recovery of punitive damages only. See *Bell v. Riley Bus Lines*, 57 So. 2d 612 (Ala. 1952) ("It has long been settled in Alabama that damages recoverable in [wrongful death] actions are punitive of the person who wrongfully causes the death."). Punitive damages, however, are not recoverable against municipalities in actions brought pursuant to 42 U.S.C. § 1983, although such

damages are recoverable against individual defendants. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269 (1981).

The mere fact that the Petitioners cannot recover *under* § 1983 against the City of Tarrant affords no legal argument that a special exception to Alabama's Wrongful Death Act should be carved out for the Petitioners. As this Court has carefully explained,

That a federal remedy should be available, however, does not mean that a § 1983 plaintiff (or his representative) must be allowed to continue an action in disregard of the state law to which § 1988 refers us. *A state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation.* If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But § 1988 *quite clearly instructs us to refer to state statutes: it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby.*

Robertson v. Wegmann, 436 U.S. 584, 593 (1978) (emphasis supplied).

In *Carter v. City of Birmingham*, *supra*, the Alabama Supreme Court held that because the Alabama Wrongful Death Act provides only for the recovery of punitive damages and, because in light of *City of Newport*, *supra*, no punitive damages

may be awarded against municipalities in § 1983 actions, a plaintiff may not recover damages from a municipality under § 1983 when death results. *Carter*, 444 So. 2d at 379. However, the court in *Carter* observed that "the state law action against the city for wrongful death is still available to the plaintiff." *Carter*, 444 So. 2d at 379.

In *Carter*, the Alabama Supreme Court directly addressed the issue of whether application of the Alabama Wrongful Death Act to § 1983 actions "creates an inconsistency with the Constitution and the laws of the United States. . . ." *Carter*, 444 So. 2d at 379. It concluded that no "inconsistency" was created because plaintiffs still have available "the state action against the city for wrongful death. . . ." *Carter*, 444 So. 2d at 379. Writing for the Alabama Supreme Court in *Carter*, Justice Beatty noted,

The interests sought to be protected by the Alabama wrongful death statute closely parallel the interests to be protected where death results from the violations of § 1983. Thus, the purpose of § 1983 is not defeated, nor are cities insulated from liability under § 1983, because the law of Alabama *does* recognize an analogous cause of action, affording an appropriate remedy in death cases.

Carter, 444 So. 2d at 380 (citing *Brown*, 518 F. Supp. at 661).

Although punitive damages may not be recovered against a municipality in a § 1983 action, "[Alabama] state law affords a remedy *beyond* that now permitted under federal law — punitive damages." *Carter*, 444 So. 2d at 379. Although punitive damages are not recoverable against municipalities "*under 42 U.S.C.*

§ 1983," *City of Newport*, 453 U.S. at 271 (emphasis supplied), in Alabama, punitive damages are recoverable against municipalities in wrongful death claims. See ALA. CODE § 6-11-29 (1975) (governmental exemption from punitive damages does not apply to wrongful death claims). A state law wrongful death action is distinct from a § 1983 claim, and the two causes of action provide for different types of damages.

Thus, the deterrent objectives of § 1983 are not impeded by referencing the Alabama Wrongful Death Act in cases in which death results from a constitutional deprivation. The Petitioners urge that application of Alabama's Wrongful Death Act provides "[no] deterrence to those who would commit [constitutional wrongs]." (Petition at 9). This argument is flawed for several reasons. First, as this Court noted in *Robertson v. Wegmann*, *supra*, and as the Alabama Supreme Court observed in *Carter*, " '[A] state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him.' " *Carter*, 444 So. 2d at 380 (quoting *Robertson*, 436 U.S. at 592). Second, the municipality faces liability under state law for wrongful death. *Carter*, 444 So. 2d at 379. Third, the official himself faces liability under state law for wrongful death. Fourth, the official himself faces potential criminal liability. Fifth, the Petitioners assume that public officials will turn a blind eye to misconduct, but " '[t]he more reasonable assumption is that responsible superiors are motivated . . . by concern for the Government's integrity.' " *City of Newport*, 453 U.S. at 268 (quoting *Carlson v. Green*, 446 U.S. 14, 21 (1980)). Finally, the Petitioners' argument assumes that municipal officials in Alabama will have a grasp of the nuances of § 1983 jurisprudence and will reach the incredible conclusion that, despite the civil and criminal liability they would face as individuals, and despite the liability that their employer would face under the Alabama Wrongful Death Act, it would make sense to kill someone, as opposed to inflicting a lesser

injury, because their employer would not have to pay damages on a § 1983 claim.

The deterrent objective of § 1983 is effective to the extent it impresses individual government actors. "[A] damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a government employer." *City of Newport*, 453 U.S. at 270. Individual actors in Alabama still face liability under § 1983 when death results. *Carter*, 444 So. 2d at 380. Application of the Alabama Wrongful Death Act to § 1983 cases does not vitiate the objective of deterrence implicit in § 1983.

Likewise, the compensatory objectives of § 1983 are not impeded by referencing the Alabama Wrongful Death Act. The Petitioners urge that application of the Alabama Wrongful Death Act offers no "Adequate Remedy for the Victims of Official Misconduct." (Petition at 14). This contention is based on an Alabama statute limiting recovery on claims against municipalities to \$100,000. (Petition at 14); see ALA. CODE § 11-93-2 (1975). This argument ignores the remedies other than a wrongful death action against the municipality available to the personal representatives of persons killed as a result of governmental misconduct in Alabama. See *supra*. Furthermore, this Court has observed: "The goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation for one who is merely suing as the executor of the deceased's estate." *Robertson*, 436 U.S. at 592. Similarly, the goal of compensation provides no basis for requiring compensatory damages to the statutory distributees to an Alabama wrongful death suit.²

2. The deceased's estate is not benefitted from a wrongful death action in Alabama; instead, any recovery is distributed according to the statute of distributions. ALA. CODE § 6-5-410(c) (1975).

C. The Petitioners mistakenly suggest that § 1983 actions have been eliminated in wrongful death cases in Alabama.

The Petitioners suggest more than once that the Alabama Supreme Court has "totally eliminate[d] § 1983 actions in death cases. . . ." (Petition at 15; *see also* Petition at 8, 13). This is a misstatement of law. Instead, the Alabama Supreme Court has held that reference must be made to the Alabama Wrongful Death Act in determining the survivability of an action for a decedent's injuries under § 1983. This holding does not eliminate § 1983 actions in cases involving death, and arguments to the contrary are both mistaken and misleading.

Additionally, the Petitioners misstate the law when they urge that the Alabama Supreme Court departed from its own precedent by refusing to be bound by the decisions of federal courts construing federal law. (Petition at 12 n. 1). As the state's highest court, the Alabama Supreme Court is bound only by United States Supreme Court decisions. U.S. CONST. art. VI, cl. 2; ALA. CONST., art. VI, amend. 328, § 6.02 (1901); *Weems v. Jefferson-Pilot Life Ins. Co.*, 663 So. 2d 905, 913 (Ala. 1995) ("[T]he correct rule, briefly stated, is that '[t]his Court may rely on a decision of any federal court, but it is bound by the decisions of the United States Supreme Court.'") (quoting *Ex parte Gurganus*, 603 So. 2d 903, 908 (Ala. 1992) (Shores, J., concurring specially)). The Alabama Supreme Court has unequivocally followed this principle of law for many years. *See, e.g., Seibold v. State*, 253 So. 2d 302 (Ala. 1970) ("It is well settled that decisions of federal courts other than the Supreme Court are not binding on a state court of last resort.").

D. The decision reached by the Alabama Supreme Court in this case does not implicate this Court's holding in *Felder v. Casey*.

The Petitioners suggest that the Alabama Supreme Court has exhibited "disdain" for this Court's holding in *Felder v. Casey*, 487 U.S. 131 (1988). (Petition at 13-14). This contention is without merit. The Petitioners rely heavily on *Felder* by selectively quoting from that opinion. A careful reading of *Felder* reveals that it is inapposite.

Felder concerned a question of preemption. *Felder*, 487 U.S. at 138. Specifically, the Court in *Felder* addressed whether application of the State of Wisconsin's notice-of-claim provision to § 1983 actions brought in state courts created an obstacle to the objectives of Congress. *Felder*, 487 U.S. at 138. The instant case does not involve preemption of state law by superseding federal law. Quite the opposite: this case involves the *adoption* of state law pursuant to the directives of 42 U.S.C. § 1988. Indeed, this Court in *Felder* agreed with the observations of lower federal courts that, "[T]he absence of any notice-of-claim provision is not a deficiency requiring the importation of such statutes into the federal civil rights scheme." *Felder*, 487 U.S. at 140. The absence of a survivorship provision, on the other hand, does involve just such a deficiency. *See Robertson*, 436 U.S. at 589-90; *Brown*, 518 F. Supp. at 665.

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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